



United States Department of the Interior

FISH AND WILDLIFE SERVICE

5275 Leesburg Pike, MS: IRTM
Falls Church, VA 22041



IN REPLY REFER TO:
FWS-2017-01049

December 20, 2019

Via email: foia@biologicaldiversity.org

Margaret E. Townsend
Open Government Staff Attorney
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211

Dear Ms. Townsend,

This letter is in regard to your Freedom of Information Act (FOIA) request, dated July 18, 2017 for “*all records mentioning, including, and/or referencing a border wall, fence, levees, and/or barriers, including but not limited to meeting notes, presentations, maps, and/or inter-agency and intra-agency correspondence from January 19, 2017 to the date of this search*” from the US Fish and Wildlife Service (FWS) Headquarters. The date range for search is from January 19, 2017 through May 20, 2019.

We are enclosing two (2) Adobe PDFs (9,454 pages) responsive to your request, of which 7,874 pages are being released to you in their entirety. An additional 1,580 pages are being withheld in full or in part as described below.

1,009 pages are being withheld in full or in part under Exemption 5. Exemption 5 allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency.” 5 U.S.C. § 552(b)(5). Exemption 5 therefore incorporates the privileges that protect materials from discovery in litigation, including the deliberative process, attorney work-product, attorney-client, and commercial information privileges. We are withholding the documents in full or in part under Exemption 5 because they qualify to be withheld under the following privileges:

Deliberative Process Privilege (243 pages in part, 608 pages in full)

The deliberative process privilege protects the decision-making process of government agencies and encourages the frank exchange of ideas on legal or policy matters by ensuring agencies are not forced to operate in a fish bowl. A number of policy purposes have been attributed to the deliberative process privilege. Among the most important are to: (1) assure that subordinates will feel free to provide the decisionmaker with their uninhibited opinions and recommendations; (2) protect against premature disclosure of proposed policies; and (3) protect against confusing the issues and misleading the public.

The deliberative process privilege protects materials that are both predecisional and deliberative. The privilege covers records that reflect the give-and-take of the consultative process” and may include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.

The materials that have been withheld under the deliberative process privilege of Exemption 5 are both predecisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. Their contents have been held confidential by all parties and public dissemination of this information would have a chilling effect on the agency's deliberative processes; expose the agency's decision-making process in such a way as to discourage candid discussion within the agency, and thereby undermine its ability to perform its mandated functions.

The deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

Attorney-Client Privilege (23 pages in part, 3 pages in full)

The attorney-client privilege protects confidential communications between an attorney and his/her client relating to a legal matter for which the client has sought professional advice and is not limited to the context of litigation. Moreover, although it fundamentally applies to confidential facts divulged by a client to his/her attorney, this privilege also encompasses any opinions given by an attorney to his/her client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect confidential client-supplied information.

The information that has been withheld under the attorney-client privilege of Exemption 5 constitutes confidential communications between agency attorneys and agency clients, related to legal matters for which the client sought professional legal assistance and services. It also encompasses opinions given by attorneys to their clients based on client-supplied facts. Additionally, the FWS employees who communicated with the attorneys regarding this information were clients of the attorneys at the time the information was generated and the attorneys were acting in their capacities as lawyers at the time they communicated legal advice. Finally, the FWS has held this information confidential and has not waived the attorney-client privilege.

Commercial Information Privilege (132 pages in part)

The information withheld under this privilege consists of an internal email address for the Service Director/Secretary of the Interior, and active conference call telephone numbers and links to video conferences. Release of internal account information could upend a high level employee's account and harm the government's ability to exchange information. As such, the release of such information could result in disruption of service attacks, which can cause a loss in productivity if devices and/or networks become crippled.

Information related to conference lines and video links could be used to conduct conference calls by parties outside the government or used to call in to monitor internal government conversations. We are withholding it because disclosure to the public would chill communications between federal employees and harm the government's ability to exchange information. When the government enters the marketplace as an ordinary commercial buyer or seller, the government's information is protected under the commercial information privilege if it is sensitive information not otherwise available, and disclosure would significantly harm the government's monetary functions or commercial interests. The theory behind the privilege is that the government may be placed at a competitive disadvantage or the consummation of a contract may be endangered if confidential information generated by the government is disclosed.

Three-hundred forty (340) pages (332 pages also withheld under Exemption 7c) are also withheld in part under Exemption 6 - Personnel and Medical Files and Similar Files. Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." [5 U.S.C. § 552\(b\)\(6\)](#).

The phrase “similar files” covers any agency records containing information about a particular individual that can be identified as applying to that individual. To determine whether releasing records containing information about a particular individual would constitute a clearly unwarranted invasion of personal privacy, we are required to balance the privacy interest that would be affected by disclosure against any public interest in the information.

Under the FOIA, the only relevant public interest to consider under the exemption is the extent to which the information sought would shed light on an agency’s performance of its statutory duties or otherwise let citizens ‘know what their government is up to. The burden is on the requester to establish that disclosure would serve the public interest. When the privacy interest at stake and the public interest in disclosure have been determined, the two competing interests must be weighed against one another to determine which is the greater result of disclosure: the harm to personal privacy or the benefit to the public. The purposes for which the request for information is made do not impact this balancing test, as a release of information requested under the FOIA constitutes a release to the general public.

The information that has been withheld under Exemption 6 consists of Secretary Bernhardt’s internal email address, and we have determined that the individuals to whom this information pertains have a substantial privacy interest in withholding it. Additionally, we have determined that the disclosure of this information would shed little or no light on the performance of the agency’s statutory duties. Because the harm to personal privacy is greater than whatever public interest may be served by disclosure, release of the information would constitute a clearly unwarranted invasion of the privacy of these individuals and we are withholding it under Exemption 6.

Five-hundred sixty-three (563) pages are being withheld in full under Exemption 7. Exemption 7 protects from disclosure “records or information compiled for law enforcement purposes” if the records fall within one or more of six specific bases for withholding set forth in subparts (a) through (f). [5 U.S.C. § 552\(b\)\(7\)\(a\)-\(f\)](#). We are withholding 127 pages in full under Exemption 7 because they are protected under the following subpart:

7(A) (3 pages in part, 212 pages in full (11 pages also withheld under 7(E))

Exemption 7(A) protects law enforcement records if their release could reasonably be expected to interfere with enforcement proceedings. For the materials that have been withheld under 7(A), we have determined they are law enforcement records for a pending or prospective investigation and releasing them could reasonably be expected to interfere with enforcement proceedings because their premature release could afford a virtual roadmap through the government’s evidence, which would provide critical insights into its legal thinking and strategy and could jeopardize the proceedings by more fully revealing the scope and nature of the government’s case and assist in circumventing the investigation; and hinder the government’s ability to further control and shape the investigation and enable targets of the investigation to elude detection; create defenses; or suppress, fabricate, or tamper with evidence.

7(C) (332 pages in part, also withheld under Exemption 6)

Exemption 7(C) protects law enforcement records if their release could reasonably be expected to constitute an unwarranted invasion of personal privacy. It is regularly applied to withhold references to individuals in law enforcement files. For the materials that have been withheld under 7(C), we have determined that releasing them would constitute an unwarranted invasion of privacy because they identify individuals referenced in law enforcement records and the release of this information would not shed light on an agency’s performance of its statutory duties.

7(E) (17 pages in full (11 pages also 7(A))

Exemption 7(E) protects law enforcement records if their release would disclose techniques and procedures for law enforcement investigation or prosecutions, or would disclose guidelines for law enforcement

investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law. For the materials that have been withheld under 7(E), we have determined that they are techniques and procedures for law enforcement investigations or prosecutions whose release could reasonably be expected to risk circumvention of the law.

We reasonably foresee that disclosure would harm an interest protected by one or more of the nine exemptions to the FOIA's general rule of disclosure.

Stacey Cummins, FWS FOIA Coordinator, is responsible for this partial denial. Justin Tade, Attorney-Advisor, in the Office of the Solicitor was consulted.

You may seek dispute resolution services from our FOIA Public Liaison, Cathy Willis, Acting FWS FOIA Officer, 720-425-5173.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Please note that using OGIS services does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of FOIA. See [5 U.S.C. 552\(c\)](#). This response is limited to those records that are subject to the requirements of FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may also appeal this response to the Department's FOIA/Privacy Act Appeals Officer. If you choose to appeal, the FOIA/Privacy Act Appeals Officer must receive your FOIA appeal **no later than 90 workdays** from the date of this letter. Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.

Your appeal must be made in writing. You may submit your appeal and accompanying materials to the FOIA/Privacy Act Appeals Officer by mail, courier service, fax, or email. All communications concerning your appeal should be clearly marked with the words: "FREEDOM OF INFORMATION APPEAL." You must include an explanation of why you believe the Service's response is in error. You must also include with your appeal copies of all correspondence between you and the Service concerning your FOIA request, including your original FOIA request and the Service's response. Failure to include with your appeal all correspondence between you and the Service will result in the Department's rejection of your appeal, unless the FOIA/Privacy Act Appeals Officer determines (in the FOIA/Privacy Act Appeals Officer's sole discretion) that good cause exists to accept the defective appeal.

Please include your name and daytime telephone number (or the name and telephone number of an appropriate contact), email address and fax number (if available) in case the FOIA/Privacy Act Appeals Officer needs additional information or clarification of your appeal.

DOI FOIA/Privacy Act Appeals Office Contact Information

Department of the Interior
Office of the Solicitor
1849 C Street, N.W.
MS-6556 MIB
Washington, DC 20240
Attn: FOIA/Privacy Act Appeals Office
Telephone: (202) 208-5339
Fax: (202) 208-6677
Email: FOIA.Appeals@sol.doi.gov

This is our final response and closes your request, FWS-2017-01049. If you have any questions, you may contact me by phone at 303-236-4473, by email at Stacey_Cummins@fws.gov, or by mail at 134 Union Blvd, Lakewood, Colorado 80228.

Sincerely,

Stacey Cummins
FOIA Coordinator

Enclosures